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Conference of States Parties to the Convention on the Rights of Persons with Disabilities

Second session

Summary record of the 3rd meeting

Held at Headquarters, New York, on Thursday, 3 September 2009, at 10 a.m.

President: Ms. Mayende-Sibiya (Acting Vice-President) ..... (South Africa)

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In the absence of Mr. Heller (Mexico), Ms. Mayende-Sibiya (South Africa), Acting Vice-President, took the Chair.

The meeting was called to order at 10.10 a.m.

Matters related to the implementation of the Convention

(b) Interactive round tables on the theme "Legislative measures to implement the Convention on the Rights of Persons with Disabilities"

1. **The Chairperson** read out articles 12 and 13 of the Convention on the Rights of Persons with Disabilities.

2. Speaking as the representative of South Africa, she said that her Government ensured that persons with disabilities enjoyed legal capacity on an equal basis. Often the victims of crime, persons with mental disabilities were protected under her country's Mental Health Act.

3. **Mr. McLay** (Acting Vice-President, Conference of States Parties) said that States parties to the Convention would have to review their legal systems to ensure that they complied with the Convention regarding decision-making by persons with disabilities. Centuries of legal practice and societal attitudes with regard to disabled persons have been an obstacle to the implementation of article 12 of the Convention.

4. **Ms. Cisternas Reyes** (Committee on the Rights of Persons with Disabilities) said that the Convention superseded the constitutions of States parties and that its rules, which were self-applicable and self-executing, must take effect as soon as possible. Article 12 went beyond article 2 of the International Covenant on Civil and Political Rights in its recognition of the equal legal capacity of persons with disabilities, bringing nineteenth century legislation up to date with advances in technology and medicine.

5. Support was required to apply the rules of the Convention to specific cases of the legal capacity to make decisions. Family and peer networks must be trained to facilitate decision-making. Society as a whole must be made aware of the need for, and be willing to provide, such support.

6. Assistance must be channelled through ministries of social affairs and justice, national commissions on persons with disabilities and independent organizations. Persons of recognized probity, with training in the rights of the disabled, must be available to assist in decision-making. Accountancy services must support persons with disabilities in handling their finances, without interfering in decisions. The support provided by non-governmental organizations (NGOs) must be financed through State subsidies, private contributions or a joint system. Persons with disabilities should have access to technology so that they could exercise their legal capacity. Computers allowed people to communicate, even when they had severe sensory impairment or could not speak.

7. Article 13 of the Convention had taken the guarantees of due process contained in article 14 of the International Covenant on Civil and Political Rights and broadened them to ensure equal access to justice of persons with disabilities. Consequently, changes must be made in the legislation and in the procedures of States parties. Access to justice was guaranteed for all parties to a case: defence, prosecution and witnesses.

8. **Ms. Minkowitz** (World Network of Users and Survivors of Psychiatry) said that it was important to define legal capacity from the point of view of persons with disabilities and to discuss the challenges ahead. No country had complete equal recognition of legal capacity or had fully eliminated forced mental health treatment. Support was needed for persons with disabilities to express their will, free from abuse that could masquerade as help.

9. Declarations of contractual incapacity affected, inter alia, the blind and deaf-blind, who were denied the right to sign legal instruments. That undermined the Convention's provisions on equal recognition.

10. Challenges included the lack of experience in supported decision-making, the fears of carers who did not want to give up control and the lack of doctrines concerning discriminatory notions of incapacity.

11. **Mr. Stenta** (Italy) said that a distinction should be made between legal rights and legal capacity. Some persons were incapable of taking legal action for a variety of reasons, ranging from lack of training in the law to mental incapacity. The Italian Parliament was therefore considering measures that would give persons with disabilities greater legal independence through supported decision-making. His country had also abolished the forced institutionalization of the mentally disabled nearly 30 years ago.

12. **Mr. Asrik** (Morocco) said that, in order for persons with disabilities to enjoy their rights, they must be accorded equal recognition before the law. Judges and the courts should make greater efforts to accommodate persons with disabilities. To that end, his country had enacted legislation that required courts to provide sign-language interpreters. Additional legislation on legal capacity and equal recognition before the law that incorporated the provisions of all relevant international instruments would soon be enacted.

13. **Mr. Buntan** (Thailand) said that, in order to ensure equal access to justice, his country's Constitution required that legal assistance and special accommodations be made available to disabled persons. However, Thai society recognized that it was difficult for persons who assisted the disabled to draw the line between assisted decision-making and substitute decision-making, particularly in cases where the person was not completely disabled. He therefore called for the issuance of guidelines in that regard.

14. **Mr. Kim** Dong-ho (Republic of Korea) said that, although his country's laws provided for the appointment of guardians for incompetent and quasi-incompetent persons, the system was overly complex and focused on property management. There was a need for a new guardianship system that reflected the spirit of article 12 of the Convention. Although it was hoped that such a system would be in place by 2010, debate would still continue on how to strike a balance between supported decision-making and the guardianship system.

15. **Mr. Burniat** (Belgium) said that although persons with disabilities were protected under his country's anti-discrimination laws, its legislation was still lagging in respect of legal capacity. The approach currently employed was paternalistic and little progress had been made in developing alternatives. Although many laws had been amended, other reform efforts had been sidetracked by discussion of important issues, such as the rights of third parties and property rights. The ratification of the Convention would help to move things forward, as his Government now had international obligations that it was obliged to fulfil.

16. **Ms. Lisskar-Dahlgren** (Sweden) said that all Swedish citizens, including those with disabilities, enjoyed legal capacity, and that the legal system provided all persons with the support required to make independent decisions. Support was tailored to individual needs and legal capacity was limited only to the extent necessary to protect an individual from injury. Courts could appoint either an administrator or an ad litem guardian. Both administrators and ad litem guardians were subject to supervision by the relevant authorities.

17. **Ms. Bernardes** (Brazil) said that her Government, in cooperation with non-governmental organizations, was in the process of amending Brazilian law to bring it into compliance with the provisions of the Convention, including those concerning access to justice. Despite both anti-discrimination and affirmative action laws, very few persons with disabilities were employed in the judicial system. The law provided for total and partial guardianship and both forms were used to protect the property of individuals. However, total guardianship, in which the rights of the disabled person were completely suspended, was the form most frequently granted. Awareness-raising programmes were needed to encourage judges to grant partial guardianship, thereby safeguarding the human rights of the disabled.

18. **Ms. Scown** (New Zealand) said that enduring power of attorney was being abused by the children of elderly parents. Those children were frequently invoking that power too early and taking decisions that benefited themselves, even when the parent was still capable of making a decision. Her country had therefore amended its laws on the enduring power of attorney and a parent was now no longer assumed to be incompetent simply for taking a decision that did not please his or her children.

19. **Ms. Velotti** (Panama) said that Panamanian law did not recognize the legal capacity of persons with disabilities. However, the Government was in the process of amending domestic legislation to bring it into compliance with the Convention.

20. **Ms. Bersanelli** (Argentina) said that a database of good practices should be created. The Committee on the Rights of Persons with Disabilities should also develop a training programme for States parties on the implementation of the Convention.

21. **Mr. McLay** (Acting Vice-President, Conference of States Parties) said that the points that had been raised challenged deep-seated views and centuries of jurisprudence. Ensuring the primacy of the Convention over domestic law and achieving full compliance with

its provisions might require States parties to amend their Constitutions. The status of the Convention in common-law jurisdictions was interesting because it gave rise to the question of whether judges should implement the Convention prior to its codification as domestic law.

22. It was troubling that certain jurisdictions denied persons with disabilities the right to make their own decisions and make their own mistakes, which were rights that were enjoyed by the vast majority of people. Significant questions surrounded the issue of supported decision-making, including the forms in which support should be provided. Many laws on treatment without consent would have to be changed; however, lawmakers might find it hard to argue in favour of such change.

23. Greater human longevity had resulted in a higher incidence of dementia and raised questions about how supported decision-making could be harmonized with court-imposed guardianship. The idea that incapacity was in and of itself discriminatory gave rise to the question about what societies should do to protect fundamental social values.

24. Although legal rights applied to all human beings, the law often assumed that some persons were not capable of exercising those rights. In order to address that problem, it was incumbent on the courts to facilitate access to persons with disabilities. Doing so would be challenging because judges held very traditional views of how court proceedings and investigations should be conducted and would not be easily persuaded to adopt any innovations in that regard.

25. Noting that the difference between assisted decision-making and substitute decision-making was often not very clear, he expressed the hope that the Conference of States Parties to the Convention would be able to provide guidance regarding the application of those concepts.

26. **Ms. Minkowitz** (World Network of Users and Survivors of Psychiatry) said that an example of supported decision-making was the use of a person who had developed a close relationship with an intellectually disabled person to interpret the latter's non-verbal communications. Persons with psychosocial disabilities could also be assisted in a similar manner. In such cases, the supporter would help the disabled person to find the services that he or she needed.

27. **Ms. Cisternas Reyes** (Committee on the Rights of Persons with Disabilities) said that article 8, on awareness-raising, was fundamental to the implementation of the Convention. Judges and the police needed to be informed about the support provided to persons with disabilities.

28. **Ms. Maina** (Vice-Chairperson of the Committee on the Rights of Persons with Disabilities) said that States were responsible for developing, promoting and offering support services for persons with disabilities and for replacing substituted decision-making legislation with frameworks for supported decision-making.

29. Enabling legislation on supported decision-making must: recognize supported decisions as being legally valid; outline ethical duties and guidelines for those who would act in a supportive role; and outline procedural guidelines that would validate supported decision-making.

30. To ensure compliance with article 12 of the Convention, State legislation must validate and recognize supported decision-making as legitimate, outline the duties of supporters and include provisions for their accountability, and indicate how those with no one to assist them could request support.

31. Supporters must give effect to the desires, wishes and choices of the person supported. They should take all practical steps necessary to determine such, including by using aids to communication. Supportive decision makers must not, however, assist in giving effect to decisions that would be illegal.

32. **Ms. Leibowitz** (International Disability Alliance-Convention on the Rights of Persons with Disabilities Forum) said that beyond understanding what was meant by access to justice and listing the rights of persons with disabilities, change on the ground involved removing the specific barriers they faced, including physical, communicational and procedural barriers.

33. Testimony by persons with disabilities should not be discredited and formal language should be avoided to enable them to understand and to use alternative forms of communication. Court officials and the police should be given training in how to communicate with persons with disabilities.

34. Examples of how to give disabled persons equal access to the justice system included the abolition of

exclusionary laws and the implementation of procedural accommodation. Allowing them to be accompanied by support providers during investigation or testimony facilitated communication, as did the use of alternative and augmentative communication aids. Experts could clear up any misunderstanding with respect to particular disabilities and could explain forms of communication in courtrooms.

35. **Ms. Arabian-Couttolenc** (Mexico) wondered what the panel and States parties in general thought of the idea of organizing a series of meetings to raise the awareness of States, their legislative bodies and members of their judiciary of the importance of implementing articles 12 and 13 of the Convention.

36. **Ms. Primor** (Israel Human Rights Centre for People with Disabilities) said that fairness in criminal law and procedure was crucial to securing equality before the law for disabled persons, both as victims and defendants. There was a systematic neglect of the needs of persons with disabilities in criminal proceedings. Governments and societies were also reluctant to acknowledge that persons with disabilities constituted a large proportion of the victims of crime.

37. Her organization had adopted a two-pronged approach in order to help disabled persons involved in criminal cases. The first part of that approach was to give disabled persons a pretrial tour of the court room. The second part was aimed at bringing about a systematic change in the way in which the justice system dealt with disabled persons. Working in close collaboration with the Israeli Ministry of Justice, the organization had succeeded in changing the laws concerning the treatment of disabled persons in criminal cases. Special procedures and accommodations were now required, ranging from expert testimony regarding the condition of the disabled person to special communications equipment.

38. **Mr. Vardakastantis** (European Disability Forum) said that the aims of the Convention would not be achieved unless articles 12 and 13 were fully implemented. Discussions at the current Conference had demonstrated the need to build the capacities of all parties involved in the Convention's implementation. Indeed, negotiating the Convention had been a simple matter when compared to its implementation. States parties should therefore give serious consideration to calls for the establishment of an intersessional group and a special United Nations fund.

39. **Ms. Richler** (Inclusion International) said that her organization was concerned that, although some States had already eliminated or were in the process of eliminating legal guardianship, substitute decision-making was still being practised, but under a different name. Moreover, there were no clear rules as to the circumstances in which guardians were appointed. She urged States parties, even those that had carried out reforms, to acknowledge that substitute decision-making was still being used to deprive persons with disabilities of their rights, and called for cooperation among all parties to solve the problem.

40. **Mr. McLay** (Acting Vice-President, Conference of States Parties) said that, while it was clear that implementation of articles 12 and 13 would not be easy and required legislative action at many levels, it was nonetheless achievable. The Convention broadened the concept of due process, particularly as defined in article 14 of the International Covenant on Civil and Political Rights.

41. Much of the action required to implement the Convention was or should be a matter of common sense. For example, a judge did not need a law to authorize the use of interpreters or other facilitators in the courtroom. The disposition of a human rights treaty should certainly be self-adjustable.

42. Article 13 of the Convention required the abolition of all laws that limited the capacity of persons to testify or prohibited them from doing so. Without such change, evidence would not be properly collected and the validity of testimony would be easily challenged. Recalling that many courts and judicial systems had found ways of accommodating disabled lawyers and judges, he wondered why the same could not be done for witnesses and litigants.

The meeting rose at 12.35